

§ 20.49

made after balancing the public benefit to be gained by the disclosure against the public loss that will result from diverting agency personnel from their other responsibilities. In any situation in which it is determined that a request for voluminous records would unduly burden and interfere with the operations of the Food and Drug Administration, the person making the request will be asked to be more specific and to narrow the request, and to agree on an orderly procedure for the production of the requested records, in order to satisfy the request without disproportionate adverse effects on agency operations.

§ 20.49 Referral to primary source of records.

Upon receipt of a request for a record or document which is contained in Food and Drug Administration files but which is available elsewhere at a lower cost, the person requesting the record or document shall be referred to the primary source of the record or document.

§ 20.50 Availability of records at National Technical Information Service.

The Food and Drug Administration is furnishing a number of records to the National Technical Information Service (NTIS), 5285 Port Royal Rd., Springfield, VA 22162, which reproduces and distributes such information to the public at cost. A single copy of each such record shall be available for public review at the Food and Drug Administration. All persons requesting copies of such records shall be answered by referring the person requesting the records to NTIS.

[42 FR 15616, Mar. 22, 1977, as amended at 54 FR 9038, Mar. 3, 1989]

§ 20.51 Use of private contractor for copying.

The Food and Drug Administration may furnish requested records to a private contractor for copying after deletion of all nondisclosable data and information. Under these circumstances, the Food and Drug Administration will charge the person requesting the records for all of the fees involved pursuant to § 20.42.

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§ 20.52 Request for review without copying.

(a) A person requesting disclosure of records shall be permitted an opportunity to review them without the necessity for copying them where the records involved contain only disclosable data and information. Under these circumstances, the Food and Drug Administration will charge only for the costs of searching for the records.

(b) Where a request is made for review of records without copying, and the records involved contain both disclosable and nondisclosable information, the records containing nondisclosable information shall first be copied with the nondisclosable information blocked out and the Food and Drug Administration will charge for the costs of searching and copying.

§ 20.53 Indexing trade secrets and confidential commercial or financial information.

Whenever the Food and Drug Administration denies a request for a record or portion thereof on the grounds that the record or portion thereof is exempt from public disclosure as trade secret or confidential commercial or financial data and information under § 20.61, and the person requesting the record subsequently contests the denial in the courts, the Food and Drug Administration will so inform the person affected, i.e., the person who submitted the record, and will require that such person intervene to defend the exempt status of the record. If a court requires the Food and Drug Administration to itemize and index such records, the Food and Drug Administration will so inform the person affected and will require that such person undertake the itemization and indexing of the records. If the affected person fails to intervene to defend the exempt status of the records and to itemize and index the disputed records, the Food and Drug Administration will take this failure into consideration in deciding whether that person has waived such exemption so as to require the Food and Drug Administration to promptly

make the records available for public disclosure.

[42 FR 15616, Mar. 22, 1977, as amended at 59 FR 535, Jan. 5, 1994]

Subpart D—Exemptions

§ 20.60 Applicability of exemptions.

(a) The exemptions established in this subpart shall apply to all Food and Drug Administration records, except as provided in subpart E of this part. Accordingly, a record that is ordinarily available for public disclosure in accordance with the provisions in subpart F of this part or of another regulation cross-referenced in § 20.100(c) is not available for such disclosure to the extent that it falls within an exemption contained in this subpart, except as provided by the limitations on exemptions specified in subpart E of this part. For example, correspondence that is ordinarily disclosable under § 20.103 is not disclosable to the extent that it contains trade secrets exempt from disclosure under § 20.61 and is not subject to discretionary release under § 20.82.

(b) Where application of one or more exemptions results in a record being disclosable in part and nondisclosable in part, the rule established in § 20.22 shall apply.

§ 20.61 Trade secrets and commercial or financial information which is privileged or confidential.

(a) A trade secret may consist of any commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort. There must be a direct relationship between the trade secret and the productive process.

(b) Commercial or financial information that is privileged or confidential means valuable data or information which is used in one's business and is of a type customarily held in strict confidence or regarded as privileged and not disclosed to any member of the public by the person to whom it belongs.

(c) Data and information submitted or divulged to the Food and Drug Administration which fall within the defi-

nitions of a trade secret or confidential commercial or financial information are not available for public disclosure.

(d) A person who submits records to the Government may designate part or all of the information in such records as exempt from disclosure under exemption 4 of the Freedom of Information Act. The person may make this designation either at the time the records are submitted to the Government or within a reasonable time thereafter. The designation must be in writing. Where a legend is required by a request for proposals or request for quotations, pursuant to 48 CFR 352.215-12, then that legend is necessary for this purpose. Any such designation will expire 10 years after the records were submitted to the Government.

(e) The procedures in this paragraph apply to records on which the submitter has designated information as provided in paragraph (d) of this section. These procedures also apply to records that were submitted to the Food and Drug Administration when the agency has substantial reason to believe that information in the records could reasonably be considered exempt under exemption 4 of the Freedom of Information Act. Certain exceptions to these procedures are set forth in paragraph (f) of this section.

(1) When the Food and Drug Administration receives a request for such records and determines that disclosure may be required, the Food and Drug Administration will make reasonable efforts to notify the submitter about these facts. The notice will include a copy of the request, and it will inform the submitter about the procedures and time limits for submission and consideration of objections to disclosure. If the Food and Drug Administration must notify a large number of submitters, notification may be done by posting or publishing a notice in a place where the submitters are reasonably likely to become aware of it.

(2) The submitter has 5 working days from receipt of the notice to object to disclosure of any part of the records and to state all bases for its objections.

(3) The Food and Drug Administration will give consideration to all bases that have been stated in a timely manner by the submitter. If the Food and